REPLY BRIEF OF PETITIONER.

In reply to the brief of the intervenor and not waiving any rights to have the same stricken, petitioner takes exception to and calls the following to the court's attention:

STATEMENT OF CASE.

The allegation the notes in suit were delivered after maturity.

On page 90 the record in C. C. A., Case 7695, the City of Stuart, a corporation, *when defendant* in the district court, *introduced* the resolution which stated on July 6, 1928, when the novation was had and the City's notes transferred, "they were not in default the time of payment having been extended by mutual agreement with the City."

Coupled with this is Green's unrebutted testimony, page 45 of the record in Case 7695, "that before he took the notes he ascertained they were not in default and that the City told him before he took them the notes were good and it would pay them." These allegations are further borne out by the later resolution of the City recognizing the debt (page 49 of Record) and the act of the state legislature, Chapter 14407, Laws, 1929 (page 59 of Record) ratifying, validating and confirming it.

On the record it shows the notes were not in default and the estoppel appeared to deny them after the City had induced Green to take them on its direct promise to him to pay them and on the strength of that promise he released Osceola Golf Club.

The resolution and testimony not only shows an estoppel to deny but a complete novation and a new promise from a new debtor, one of whom, Green, was a nonresident.

The further objection is a Florida statute vitiated such a transaction.

The defendant filed no cross assignment of errors on appeal raising this question but raised it in its brief and the appellate court passed on this exact question in 81 F. 2d 968, and found there was no substance to the claim and that the defendant had the land and had not paid for it and a later city commission had ratified the purchase as did the legislature. The defendant asked for a rehearing on this question which was denied.

SITUATION AFTER FIRST REMAND.

After the appellate court rendered its opinion in 81 F. 2d 968 and sent down its mandate and the defendant, having made a motion for directed verdict and the same granted, and the case reversed, no further trial was necessary. This was so because of the rule the demurrer to the evidence was a waiver of trial but also because of the rule in *Slocum* v. *New York Life*, 228 U. S. 381; *Pacific* v. *Faish*, 213 Fed. 448.

> "By making such a motion, the defendant waives his right to a jury trial and impliedly consents to the entry of a judgment against him if the motion is granted and the judgment entered thereon is reversed."

When the first mandate came down the plaintiff made his motion (page 28 of Record in Case 8437) but instead of granting it, the district judge granted a new trial (page 29 of Record).

The defendant then filed its demurrer to the jurisdiction of the court over the parties (page 32 of Record) which only asked the trial judge to reverse his appellate court for assuming jurisdiction and which the court had to deny as an improper suggestion. The appellate court had assumed jurisdiction and written a full opinion and passed on all the questions involved (81 F. 2d 968) and,

therefore, the plaintiff asked the court to ascertain and state what issues remained to be tried. That the court had to construe the opinion and the mandate as to what further procedure was contemplated under the mandate and there were no issues to try, as the appellate court had passed on all the questions involved and to review these again was error. Thereupon, the court limited the issues as to whether the notes were under seal and what a reasonable attorney's fee was (page 35 of Record) in Case 8437, regardless of the fact there was no plea denying they were under seal and they were in evidence (page 47 of Record, Case No. 7695) and under seal and evidence unrebutted in the record that 10 per cent was a reasonable attorney's fee (page 62 of Record in Case 7695), all of which was admitted by the defendant's motion for a directed verdict. However, as the judgment finally entered was in substantial compliance with the mandate (page 41 of Record in Case 8437) the plaintiff contends that was the end of jurisdiction of the federal court.

The later appeals and decisions were void as rendered by courts that had lost jurisdiction.

AS TO ALTERNATIVE WRIT OF MANDAMUS

or

RULE TO SHOW CAUSE.

The rule in Florida and in the federal courts is that if the judge fails and refuses to assume jurisdiction because of some supposed want or lack, the proper remedy is by mandamus to make it appear to his superior court he has in fact jurisdiction but refuses because of some claimed impediment or want of process to exercise it and thus, refusal to proceed cannot be reviewed by appeal or writ of error. In this case, the later void judgments and decisions of the circuit court of appeals rendered

when it had lost jurisdiction of the case appeared as the impediment and petitioner recognizes that the district judge even though he felt the circuit court should not and did not have the power to reverse him for entering a judgment according to its mandate at a later term and when it had no jurisdiction to make any orders, still he could not reverse it for doing so, and he had to decline and the only way this error could be corrected if the circuit court could or would not enter the rule to show cause and correct it, was for this court to do so on certiorari.

Nelson v. *Indian Beach*, 147 So. 268, 109 Fla. 282:

> "If the judge exceeds his authority by attempting to vacate a final judgment at a time after such judgment has passed beyond his control to deal with the remedy is by mandamus to coerce the judge to undo his own wrong by reinstating the judgment so unlawfully interfered with by him." *State* v. *Wolfe*, 58 Fla. 523, 50 So. 511.

The notes in 4 A. L. R. 582, with the collection of federal and Florida cases, only support the petitioner's contention that in such a case mandamus is the only appropriate remedy.

Going back to the Nelson case, writ of error was taken from the order of the trial judge vacating a final judgment, but the *writ was dismissed* because the order vacating the final judgment was not a sufficient final judgment from which appeal or writ of error lay and there was no adequate remedy except by mandamus.

The records and published opinions of the circuit court of appeals show conclusively the district and appellate court had jurisdiction and wrote and handed down an opinion in 81 F. 2d 968, and it always had jurisdiction of the case on the novation feature, and did assume jurisdiction and then deny it, without recalling its mandate and so confiscated the petitioner's property in the notes.

The former writ of certiorari was denied, as Justice Holmes stated, its denial is in no sense an act affirming the decision. If the petitioner could not appeal from the order vacating his judgment and his only remedy was by mandamus, then this court may have refused to review because of such defect but in no way placed any stamp of approval on such method of procedure.

Williams v. *Capehart*, 54 So. 774, 777:

> "The fact that Capehart may have endeavored to appeal from the order of the county judge does not debar him from proceeding by mandamus."

The court will consider the petitioner is sailing over an uncharted sea in this proceeding. There are no precedents for such procedure or earlier decisions to guide as to just what the proper procedure is in such cases to obtain relief. The guide post is that where the only grounds of jurisdiction is diversity of citizenship, the judgment of the C. C. A. is final and that no court can reverse its own final judgments on second appeal or after it has lost control of its mandate and the term has passed in which the judgment was rendered.

Petitioner respectfully contends the district judge should be required to vacate his judgment quashing petitioner's judgment and reinstate the same.

Respectfully submitted,

MANLEY P. CALDWELL,
Attorney for Petitioner.

CARROLL DUNSCOMBE,
Counsel.